

CHAPTER 3 - CONTRACT MODIFICATIONS

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(NOTE: All forms are available on Informs)

Contract Modifications

3-1 Introduction

The following chapter provides guidance and the requirements for developing and processing contract modifications. The Project Engineer is responsible for the tasks listed in the process, except as otherwise noted. Throughout the process, the Project Engineer should coordinate with the Construction Operations Engineer (COE).

A contract modification is a negotiated acquisition. Part 15 of the Federal Acquisition Regulations (FAR) prescribes the policies and procedures governing negotiated acquisitions. The process outlined on the following pages is based on FAR Part 15, the Transportation Acquisition Manual (TAM), and the Transportation Acquisition Regulations (TAR). The process applies to all contract modifications except contract modifications written to exercise an option (FAR Part 17). The process does not apply to resolution of claims submitted under FAR Part 33.

To the maximum extent possible, a separate modification should be prepared for each situation. Avoid combining multiple unrelated issues in the same modification.

3-2 Authority

Only contracting officers acting within the scope of their contracting officer warrant are authorized to execute contract modifications on behalf of FHWA. Except for life-threatening or emergency situations, other FHWA personnel shall not:

- act in such a manner as to cause the contractor to believe that they have authority to bind the FHWA
- direct or encourage the contractor to perform work that could be the subject of a contract modification

The delegation of authority letter, issued to the contractor between the time of award and issuance of the notice to proceed, identifies the specific levels of authority for a particular project. The Project Engineer has authority to negotiate modifications up to the dollar amount approved by the Contracting Officer in the pre-negotiation memorandum. (Note: Where a pre-negotiation memo is not required, the negotiation authority is established by the price negotiation memorandum.) Authority to approve modifications is as follows:

| | |
|--|----------------------------------|
| modifications \$50,000 or less (time: max 50 days) | Construction Operations Engineer |
| modifications \$200,000 or less (time: max 100 days) | Construction Engineer |
| modifications \$500,000 or less | Contract Development Engineer |
| modifications greater than \$500,000 | Contract Development Engineer* |

*(with Division Engineer or PP&A Engineer concurrence)

3-3 Change Orders

FHWA contracts contain a Changes clause that permits the contracting officer to make unilateral changes within the general scope of the contract. If halting or impeding the changed work would adversely affect the government's interest, a change order should be issued. A change order is a written directive, signed by the contracting officer, requiring the contractor to make a change without the contractor's consent. A change order allows the contractor to proceed with the work even though the terms and conditions of the contract modification have not been definitized. Change orders are not typically forward priced and therefore they require two documents: the change order (using SF 30) and a supplemental agreement reflecting the resulting equitable adjustment in contract terms.

Include the following in the change order:

- scope of work
- a specific timetable for definitizing a bilateral contract modification
- a not-to-exceed estimate of cost which is used to obligate funds for the modification

While issuance of a change order allows the contractor to begin work before the contractor and government have an opportunity to agree on the terms and conditions of the modification, a change order does not negate the process requirements outlined in Section 3-6. You must still coordinate with FHWA and external parties, develop an approximate cost estimate, and secure an approved procurement request prior to having the Contracting Officer approve the change order. Follow the process outlined in Section 3-6 for definitization of the change order.

3-4 Types of Contract Modifications

Contract modifications are either bilateral or unilateral.

3-4.1 Bilateral Contract Modifications

A bilateral modification (supplemental agreement) is a contract modification that is signed by the contractor and the contracting officer. Bilateral modifications, for example, are used to –

- make negotiated equitable adjustments resulting from the issuance of a change order
- definitize letter contracts
- reflect other agreements of the parties modifying the terms of the contract

3-4.2 Unilateral Contract Modifications

A unilateral modification is a contract modification that is signed only by the contracting officer. Unilateral modifications are used, for example, to –

- allow performance and payment of work without agreement on terms and conditions (i.e. price and time) of the modification
- make administrative changes
- issue change orders
- make changes authorized by the Options clause
- issue termination notices

3-5 Contract Clauses

The authority to change the contract and make adjustments to the contract amount originates from the various FAR clauses. The majority of contract modifications are authorized by the Changes clause. The Changes clause and the other most commonly used FAR clauses are described below. For more information on any particular clause, contact your COE or refer to *Administration of Government Contracts* by Nash and Cibinic.

3-5.1 FAR Clause 52.243-4, Changes

The Changes clause gives the government the unilateral right to make changes in the work within the general scope of the contract, including changes to the plans and specifications, the method of work, government furnished materials, and the time allowed to complete the contract. The Changes clause also provides the means under the contract for the government to make an equitable adjustment for constructive changes and defective plans or specifications. The term “within the general scope of the contract” is defined as work that “should be regarded as fairly and reasonably within the contemplation of the parties when the contract was entered into.” Changes outside the scope of the contract are referred to as “cardinal changes” and are not within the authority of the Construction Branch.

3-5.2 FAR Clause 52.249-10, Default

The Default clause serves two purposes. First, it allows the government to terminate the contractor’s right to proceed if the contractor has not performed with due diligence, or if the contractor has not completed work within the time specified in the contract. Second, the clause allows for an adjustment to contract time if the contractor or its subcontractor is delayed due to: acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restriction, strikes, freight embargoes, and unusually severe weather. Under the Default clause, the contractor is only entitled to time extensions; there is no provision for monetary compensation.

3-5.3 FAR Clause 52.236-2, Differing Site Conditions

The Differing Site Conditions clause provides a remedy for situations where the actual physical conditions at the work site are materially different than either the conditions represented in the contract (Type I Differing Site Condition) or the conditions that would normally be encountered during work of that nature in the particular area (Type II Differing Site Condition).

3-5.4 FAR Clause 52.242-14, Suspension of Work

The Suspension of Work clause allows the government to suspend, delay, or interrupt the contractor’s work for the period of time that is appropriate for the convenience of the government. If the contractor’s performance is suspended, delayed, or interrupted for an unreasonable period of time by the government, the contractor is entitled to an adjustment for any increase in the cost of performance. Under the Suspension of Work clause, the contractor is not entitled to profit.

3-5.5 FAR Clause 52.211-18, Variation in Estimated Quantity

The VEQ clause allows an adjustment to the contract when the actual quantities vary by more than 15 percent from the bid schedule quantities. Adjustments are allowable only if the contractor's costs increase or decrease due solely to the variation. The unit price adjustment must reflect only reduced performance costs realized due to economies of scale on overrun units or increased performance costs experienced due to loss of efficiency on underrun units.

The clause does not provide a remedy for situations where the contractor lost money due to a low bid, or where the contractor gained a windfall profit due to a high bid. The VEQ clause cannot be used for price adjustments in situations where the increase or decrease in quantity was caused by a differing site condition, a bid quantity error, or a contract change.

3-5.6 FAR Clause 52.248-3, Value Engineering

Contractors may be able to perform work in less expensive ways than provided in the contract. The Value Engineering clause is the appropriate avenue for addressing a contractor-initiated change. The clause is an incentive for the contractor to develop cost savings proposals, as it allows the contractor a share of the cost savings realized from the approved value engineering change proposal.

3-6 Contract Modifications Process

The process outlined on the following pages provides the requirements for developing, preparing, and executing a contract modification. While the process applies to the majority of contract modifications, the steps may be reordered or modified depending on the situation.

The Project Engineer is responsible for complying with the process and ensuring that the COE is kept involved and informed throughout the process.

3-6.1 Identify the Need for a Contract Modification

Contract modifications are initiated for a multitude of reasons. In general, either the land-owning agency, a cooperating agency, the contractor, or FHWA can identify the need for a contract modification. Typical situations which may necessitate a modification are listed below.

A. Land-Ownning Agency

1. Provide an alternate materials source
2. Paving of campgrounds or parking areas

B. Road Owning Agency

1. Stockpiling aggregate for owner's use
2. Change work restrictions listed in the contract

C. Cooperating Agency

1. Change environmental restrictions listed in the contract
2. Revise culvert pipe details to improve fish passage
3. Revise revegetation plans

D. Contractor

1. Correction of an error or omission in the plans or specifications
2. Price adjustment for acceptance of work or material which does not conform to the contract requirements
3. Value engineering proposals
4. Equitable adjustments for differing site conditions or variations in quantity
5. Time extensions for excusable delays

E. FHWA

1. Change in the plans or specifications
2. Adjustments for suspensions or terminations for convenience
3. Correction of an error or omission in the plans or specifications
4. Adding work not provided for in the plans and specifications
5. Substituting or deleting work
6. Accelerating work

3-6.2 Coordinate with FHWA and External Agencies

Once the need for a modification has been identified, it is essential for you and the COE to coordinate with the parties who may have an interest in the modification. Continue this coordination throughout development of modification. Coordination with appropriate parties will ensure the modification is developed properly and issued timely. Also, the earlier an interested party is brought into the process, the greater likelihood that the modification will be developed smoothly and successfully.

The parties which are most commonly involved in the contract modification process and their roles in the process are listed below. As this list is not all inclusive, use judgement and discretion in selecting who will be involved for the particular situation.

Document cross-functional team members' involvement and concurrence with development of the contract modification. Include this documentation with the modification support data.

A. Land Owning and Road Owning agencies (U.S. Forest Service, County, State DOT, NPS, etc.) You will need the agency's concurrence in context of all changes. Although some modifications may not affect the road owners, it is a good idea to keep them informed of all modifications. It gives them the sense of being a partner in the project and results in a smoother running project. If the modification is requested by the road owner, this request should be provided in writing. Depending on the scope of the modification, the road owner may need to provide approval and funding. In general, the same guidelines exist for the land owners as for the road owners.

For National Park Service projects, you should prepare a letter to the appropriate officials, explaining the general scope of the change as well as the expected dollar range.

B. FHWA

1. Program Coordination and Finance Engineer or the Engineering Program Coordinator
These individuals will establish the availability of funds for the proposed modification. If funds are not currently available, the Program Coordination and Finance Engineer will research other funding avenues. For modifications estimated to be greater than \$50,000 or modifications developed during the last quarter of the fiscal year, notify the Program Coordination and Finance Engineer of the approximate dollar amount prior to refining the scope of the modification. The availability of funds can severely impact both the scope and the timing of the modification.

2. Designer

The Designer is your main point of contact for nearly all contract modifications. Communication with the Designer is critical to identifying both the underlying reasons for particular design details or specifications, as well as commitments (to owning, maintaining, and resource agencies) that may be impacted by the modification. The Designer can also assist in coordinating with other FHWA technical specialists.

3. Environmental Engineer or Specialist

Contact the Environmental Engineer or Specialist if there is any possibility that the proposed modification might have environmental or permit consequences, or might alter the environmental mitigation features established in the contract. The Environmental Engineer or Specialist will coordinate any permit requirements.

4. Materials Team

Coordinate proposed changes to materials specifications (gradation, sand equivalent, pavement structure, material sources, etc.) with the Materials Team.

5. Bridge Team

Discuss proposed changes to structures (bridge, retaining wall, box culvert, etc.) with the Bridge Team.

6. Hydraulics Team

Coordinate proposed modifications to culverts and major erosion control features with the Hydraulics Team.

7. Geotechnical Team

Coordinate proposed modifications to slopes, retaining walls, pavement structure, material sources, etc., with the Geotechnical Team.

C. Cooperating Agencies

Cooperating agencies include: State Fish and Game, U.S. Fish and Wildlife, National Marine Fisheries Services, U.S. Army Corps of Engineers, U.S. Forest Service, State Department of Transportation, BLM, military, etc.

3-6.3 Identify Scope of Work

Identification of a clear and concise scope of work will enable the contractor to develop their price proposal and will provide a basis for negotiations. The scope of work needs to include sufficient detail for the contractor to reasonably develop their proposal. The scope of work may be revised based on information provided in negotiations or discussions with the contractor.

Include the following in the scope of work:

- General description of the proposed modification
- Location
- Preliminary specifications and design details
- Quantity of work
- Restrictions on when and how the work can be performed

3-6.4 Request Contractor to Prepare a Proposal

Once the scope of work has been identified, prepare a letter requesting the contractor to develop a price proposal for the proposed modification. Include the following in the letter:

- Proposed modification number (Note: To the extent possible, CM's should be number sequentially. If an earlier proposed CM was voided, do not use that CM number for your new CM)
- Scope of work
- Request to prepare a price proposal for the identified scope of work
- Preferred pricing format (square meter, lump sum, day, etc.)
- Time
- Date by which the price proposal should be submitted to the Project Engineer

3-6.5 Prepare an Independent Government Estimate (IGE)

IGE's are required for all contract modifications except modifications to exercise fixed priced options (FAR Part 17).

A well prepared IGE is essential if the government is to receive a fair and reasonable price for the contract modification work. Without an accurate IGE, the government has no basis upon which to evaluate the contractor's proposal. Therefore, it is imperative to prepare the independent government estimate prior to receiving the contractor's proposal and to not base the IGE on data furnished by the contractor. The level of detail should be commensurate with the complexity and value of the modification.

Sign and date the IGE once it is completed. Also, label the top of the IGE "*For Official Use Only.*" Do not disclose the IGE prior to conducting negotiations with the contractor.

A. Sources for IGE Data

Data for the IGE can be obtained from the following:

1. Bid prices within the contract or prices from other current, competitively bid contracts, if determined to be fair and reasonable
2. Costs established from estimates of labor, equipment, materials, and amounts for overhead and profit
3. Historical data such as average bid prices
4. Quotes from suppliers or other contractors
5. Unit prices or production rates from sources such as the Means or Dodge handbooks
6. U.S. Army Corps of Engineers *Construction Equipment Ownership and Operating Expense Schedules*
7. Data from the contractor's bid papers

B. Adjustments to Data

The estimated prices obtained from any source should be adjusted for:

1. Inflation
2. Location – does remoteness affect the cost?
3. Quantity and Specifications – are similar quantities and specifications involved for those items being compared?
4. Timing of Work – will the work be performed during good or adverse weather conditions?
5. New technology
6. Overhead and Profit – are overhead, profit, and other factors included in the prices?
7. Any other factors, which may affect the contractor's cost.

3-6.6 Determine If Cost and Pricing Data Are Required

Cost or pricing data may be required in the event the modification exceeds \$500,000 aggregate (i.e., consider both increases and decreases when determining the price adjustment). If the IGE is greater than \$500,000 (aggregate), your COE or the Contract Administration Engineer should review the FAR and advise you on the cost or pricing data requirements for your particular situation. If the IGE is greater than \$500,000 and it is determined that Cost or Pricing Data is not required, document the exception used and the basis for using it. Include this information in the Price Negotiation memorandum (Subsection 3-6.12)

For modifications less than \$500,000 (aggregate), you should not request the contractor to provide cost or pricing data.

3-6.7 Analyze the Contractor's Proposal

The objective of analyzing the contractor's proposal is to develop a negotiation position that permits the Project Engineer and the contractor an opportunity to reach agreement on a fair and reasonable price. The Project Engineer is responsible for evaluating the reasonableness of the offered prices. The complexity and circumstance of each modification should determine the level of detail of the analysis required.

When the contractor's proposed price is significantly lower than the IGE, you need to ensure that you and the contractor completely understand the scope of work. The three techniques for analyzing a contractor's proposal are price analysis, cost analysis, and profit analysis. Their applicability is dependent on whether Cost or Pricing Data is required. Each type and their applicability are described below.

A. Technique Applicability

1. Modifications not requiring Cost or Pricing Data

When Cost or Pricing Data is not required, you should first analyze the contractor's proposal using price analysis. Compare their bottom line price to your IGE price. If their price is comparable to the IGE price, it is not necessary to obtain additional information from the contractor or to conduct a cost analysis.

If the contractor's price is not within an acceptable range of the IGE, you should consider requesting a cost breakdown of the contractor's proposal. Using their cost breakdown, you then can perform cost analysis to determine where the difference originates and which elements of the proposal you need to discuss with the contractor.

2. Modifications requiring Cost or Pricing Data

When Cost or Pricing Data is required, you will need to analyze the contractor's proposal using cost, price, and profit analysis.

B. Analysis Techniques

1. Price Analysis

a

- a. Definition. Price analysis is the process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit.
- b. Examples. Various price analysis techniques and procedures may be used to ensure a fair and reasonable price, given the circumstances surrounding the modification. Examples of such techniques include, but are not limited to the following:
 - (1) Comparison of proposed prices with independent government price estimates.
 - (2) Comparison of contract unit prices with proposed prices for the same or similar items.
 - (3) Comparison of proposed prices with historical bid data for similar items.

2. Cost Analysis

a. Definition. Costs analysis is the review and evaluation of the separate cost elements and profit in a contractor's proposal, and the application of judgment to determine how well the proposed costs represent what the cost of the modification should be.

b. Examples. Various cost analysis techniques and procedures may be used to ensure a fair and reasonable price, given the circumstance surrounding the modification. Examples of such techniques include, but are not limited to the following:

(1.) Comparison of the individual cost elements of the contractor's proposal with:

- (a) actual costs previously incurred by the same contractor
- (b) independent government cost estimates
- © various cost schedules (Corps equipment rates, Means, etc.)

(2.) Verification of cost or pricing data and evaluation of cost elements, including:

- (a) the necessity for, and reasonableness of, proposed costs, including allowances for contingencies
- (b) the application of audited or negotiated indirect cost rates and labor rates

3. Profit Analysis

a. General. Both the government and contractors should be concerned with profit as a motivator of efficient and effective modification performance. Negotiations aimed merely at reducing prices by reducing profit, without proper recognition of the function of profit, are not in the government's best interest. Negotiation of extremely low profits, use of historical averages, or automatic application of predetermined percentages to total estimated costs do not provide proper motivation for optimum modification performance.

b. Determination of Profit Amount

(1) Modifications not requiring Cost or Pricing Data

If a change or modification calls for essentially the same type and mix of work as the basic contract and is of relatively small dollar value compared to the total contract value, the government may use the basic contract's profit rate as the pre-negotiation objective for the modification. For post-priced modifications, the contractor's risk has been eliminated. This factor should be considered when determining the profit rate for post-priced modifications. A five to ten percent profit margin is reasonable for post-priced work.

(2) Modifications requiring Cost or Pricing Data

If cost or pricing data is required, use the structured approach to analyze profit.

3-6.8 Accept the Contractor's Proposal or Perform Additional Fact Finding

If the contractor's price proposal is determined fair and reasonable using either price analysis, or cost and price analysis, accept the contractor's price without further negotiations. In this case, proceed to Subsection 3-6.12, Prepare a Price Negotiation Memorandum.

If your prices differ appreciably from the contractor's, and you cannot accept their price as is, you may have to request more information from the contractor. For instance, you may need more detailed information on the cost elements of the contractor's proposal. The purpose of fact finding is to provide the government with sufficient information to develop a defensible position. Discuss the pertinent issues with the contractor and ask for a revised proposal to reflect the information learned and understanding reached in the discussions. Document all discussions and include in the pre-negotiation memorandum.

3-6.9 Prepare a Pre-negotiation Memorandum

The pre-negotiation memorandum is required for all proposed modifications where negotiations are necessary.

A. Purpose

The two primary purposes of the pre-negotiation memorandum are to: 1) establish the government's negotiation positions and 2) obtain the contracting officer's approval of the pre-negotiation objectives. **Project Engineers are not authorized to negotiate with the contractor until the appropriate Contracting Officer has approved the pre-negotiation memorandum.**

B. Format

The pre-negotiation memorandum should be a 'memo' written by the Project Engineer to the CO authorized to approve the proposed modification. If the authorizing CO is at a level above the COE (and CE), the pre-negotiation memorandum should be written through the COE (and CE) for their concurrence. For example, if the Contract Development Engineer were the approving CO, you must send the pre-negotiation memorandum through the COE and CE for their concurrence.

C. Content

- | | | |
|----|------------------------|--|
| 1. | .Subject | "Pre-negotiation Memorandum" |
| 2. | .Identification | "Project name and number" |
| | " | Contract number" |
| | | "Proposed contract modification number" |
| 3. | Date | |
| 4. | From | "Project Engineer's Name" and signature |
| 5. | To | "Approving CO's name, <i>Contracting Officer</i> " |
| 6. | Through (if necessary) | "COE's (and CE's) name" |

7. Modification Reason and Description
 - a. What necessitated the proposed modification? If the modification was requested, attach correspondence, e-mails, or diary entries documenting the request.
 - b. Scope of work
8. Prices
 - a. IGE amount
 - b. Contractor's proposed price
 - c. Government's pre-negotiation objective
9. Time
 - a. IGE time extension or decrease
 - b. Contractor's requested time extension or decrease
 - c. Government's pre-negotiation objective
10. Basis for Pre-negotiation Objectives

The 'explanation' is the most important part of the pre-negotiation memorandum as it is the justification for a fair and reasonable pre-negotiation objective. This part of the pre-negotiation memorandum needs to explain:

 - a. How the Project Engineer established the pre-negotiation objective
 - b. Why the pre-negotiation objective is reasonable
11. Proposed Total Price of the Proposed Modification (list items individually and show the total) and Requested Negotiation Authority

D. Concurrence and Approval

Obtain written approval of the pre-negotiation memorandum prior to negotiating with the contractor. Verbal approvals are not acceptable. All signatures (concurring and approving) should be on the pre-negotiation memorandum or in an e-mail attached to the pre-negotiation memorandum.

When the authorized CO approves the pre-negotiation memorandum, they will indicate the dollar range which you are approved to negotiate within.

The various levels of concurrence and approvals listed below are based on the net amount of the modification. The aggregate amount of the modification is used only to determine if cost or pricing data is required.

1. CM \$50,000
 - a. Approval..... COE
2. \$50,000 < CM \$200,000
 - a.. Concurrence COE
 - .b. Approval Construction Engineer
3. \$200,000 < CM \$500,000
 - . Concurrence COE and Construction Engineer
 - . Approval Contract Development Engineer
4. CM > \$500,000
 - . Concurrence COE, CE, and Contract Development Engineer
 - . 2nd Level concurrence Division Engineer or PP&A Engineer
 - . Approval Contract Development Engineer

3-6.10 Complete a Procurement Request

Contract modifications either increase, decrease, or have no effect on the contract amount. Procurement requests are required for modifications which increase or decrease the contract amount. Procurement requests are not required for ‘no cost’ situations (e.g. the contractor can begin work in a restricted area early and therefore the contract fixed completion is modified, or \$100,000 of work is added and \$100,000 of work is deleted from the contract).

Include the information listed below on the Procurement Request. Use the pre-negotiation objectives as the starting point for establishing the PR dollar amount. The PR must be approved before you begin negotiations with the contractor.

| Block | Data |
|--------|---|
| 1 | Project Engineer’s Name |
| 2C | Contract Number |
| 4 | Project Number and Name |
| 5A (1) | Name, title, and signature of requisitioner |
| 5C (1) | Date |
| 6 | Project Engineer’s Name Project Office Address |
| 9 | CM number, Item Number and Name, Quantity, Unit, Unit Price, etc. (Note: The list of items is necessary in order for PP&C to accurately track the cost on the estimate to ensure that sufficient funds have been set aside to cover the full cost of the contract modification.) |
| 10 | Account Number |

Funds for the proposed modification can originate from two places –

A. Within the Contract

These are project funds that will not be used due to quantity underruns or unused incentives (DBE and pay factor). In the quantity underrun case, the contract modification must delete the unnecessary items and quantities in order to make those funds available for the added work in the modification. If funds for the added work will come from unused incentives, specify which item(s) the funds are coming from (i.e., DBE, Item 40101, Item 30101, etc.). Before using incentive money as a source of funds for the modification, be absolutely sure that the incentive money is definitely unneeded.

Even though funds for a modification are provided by ‘within the contract’ sources, the Engineering Program Coordinator needs to approve the Procurement Request. This will facilitate proper tracking of funds.

B. Outside the Contract

These are funds which are made available through the WFL’s Program Coordination and Finance Engineer or the Engineering Program Coordinator.

3-6.11 Negotiate with the Contractor

The goal of negotiations is to agree on a fair and reasonable price. A fair and reasonable price does not require that agreement be reached on every element of cost, nor is it mandatory that the agreed price be within the government's initial negotiation position. Successful negotiations depend on good faith and fair dealing, and an understanding of both parties' interests.

A. The government's negotiator

In most cases, you, the Project Engineer, are the government's negotiator. You are approved to negotiate within the dollar range approved by the CO in the pre-negotiation memorandum.

B. Agenda for negotiations

The agenda can play an important part in negotiations and should be prepared by the government's negotiator. Some negotiators will initially discuss non-controversial elements at the negotiations in order to create a climate of cooperation; others prefer to start by bringing up an issue where the government has strength to create positive momentum. In any case, all elements of the CM must be clear to both parties, including the work involved, any unusual features or technicalities, time required for work, and impacts on other work.

C. Dealing with new information

During negotiations, a new concept or additional information which alters the basics of the pre-negotiation objectives could be brought forth. Review the new information and if additional time for study is required, advise the contractor and reschedule the negotiations as appropriate.

D. Negotiation minutes

Document each negotiation session with minutes of the negotiations. These minutes will be used to develop the price negotiation memorandum.

3-6.12 Prepare a Price Negotiation Memorandum

Price negotiation memoranda are required for all contract modifications. The complexity of a price negotiation memorandum will depend upon the nature of the modifications and the negotiations. (Note: If the modification does not involve money, i.e. the proposed CM revises the contract start and completion dates, a price negotiation memorandum is still required; however, it only needs to explain how you arrived at the final terms and conditions of the agreement.)

A. Purpose

The two primary purposes of the price negotiation memorandum are to: 1) document the outcome of negotiations and how the final price was reached, and 2) obtain the contracting officer's approval of the final price.

B. Format

The price negotiation memorandum should be a 'memo' written by the Project Engineer to the CO authorized to approve the proposed modification. If the authorizing CO is at a level above the COE (and CE), the price negotiation memorandum should be written through the COE (and CE) for their review and concurrence.

C. Content

1. Subject "Price Negotiation Memorandum"
2. Identification "Project name and number"
"Contract number"
"Proposed contract modification number"
3. Date
4. From "Project Engineer's name" and signature
5. To "Approving CO's name, *Contracting Officer*"
6. Through (if necessary) "COE's (and CE's) name"
7. Purpose of the negotiation
8. The government's negotiation objective
9. Negotiation Details
 - a. The contractor's proposal
 - b. The government's negotiation objective
 - c. The negotiations, i.e., what was discussed, what were the agreements, what were the final prices, how did you arrive at the final prices, and will contract time be extended.
 - d. The remaining unresolved issues and the next steps if needed.
 - e. Price reasonableness
 - (1) If price reasonableness was based on price analysis, the summary shall include the source and type of data used to support the determination.
 - (2) If price reasonableness was based on cost analysis, the summary shall address each major cost element.
10. If the CM will exceed \$500,000 and Cost or Pricing Data was not required, explain the exception used and the basis for using it (see Subsection 3-6.6). If Cost or Pricing Data was required for the modification, contact your COE or the Contract Administration Engineer to determine what additional documentation is required for the price negotiation memorandum.

D. Review, Concurrence, and Approval

Obtain written approval of the price negotiation memorandum prior to sending the contract modification to the contractor for their signature. Verbal approvals are not acceptable. All signatures (concurring and approving) should be on the price negotiation memorandum or in an e-mail attached to the price negotiation memorandum.

The various levels of concurrence and approval listed below are based on the net amount of the modification. The aggregate amount of the modification is only used to determine if cost or pricing data is required.

- | | | |
|----|--------------------------------------|------------------------------------|
| 1. | CM # \$50,000 | |
| | a. Approval..... | COE |
| 2. | \$50,000 < CM # \$200,000 | |
| | a.. Concurrence | COE |
| | b. Approval | Construction Engineer |
| 3. | \$200,000 < CM # \$500,000 | |
| | a. Concurrence | COE and Construction Engineer |
| | b. Approval | Contract Development Engineer |
| 4. | CM > \$500,000 | |
| | a. Concurrence | COE and Construction Engineer |
| | b. Legal review | Legal Counsel |
| | c. Concurrence | Contract Development Engineer |
| | d. 2 nd Level concurrence | Division Engineer or PP&A Engineer |
| | e. Approval | Contract Development Engineer |

3-6.13 Amend the PR

If the final negotiated amount is greater than the “total estimated cost” shown on the procurement request, notify the Engineering Program Coordinator and they will amend the funding amount and the procurement request. The Engineering Program Coordinator will send a copy of the amended PR to you.

3-6.14 Determine What Type of Contract Modification to Issue

A. Bilateral Contract Modification

If the contractor and the government have reached full agreement on the work, price, and time considerations included in the modification, issue a bilateral modification and include the release language (SF 30, Block 14) shown in Section 7.

B. Bilateral Contract Modification with Exceptions

When only a portion of a modification can be agreed upon, prepare a bilateral modification which identifies the agreed upon elements, as well as the elements where no agreement was reached. For instance, if the contract modification increases the borrow excavation, equipment rental, and traffic control quantities, and the contractor agrees with prices for the borrow excavation and equipment rental, but not the traffic control items, the modification (SF-30a) should state:

In consideration of the equitable adjustments paid pursuant to this contract modification, the Contractor hereby releases the Government from any and all liability under this contract due to any facts or circumstances arising out of this contract modification, except for direct and indirect costs for the following:

Temporary Concrete Barrier

Type A Warning Light

The Contractor reserves the right to pursue further administrative action on Temporary Concrete Barrier and Type A Warning Light as established within this supplemental agreement under FAR Clause 52.233-1, Disputes.

In the ‘exception,’ specifically state whether the exceptions apply to direct costs only, indirect costs (indirect costs overhead, profit, impact, delay, etc.) only, or to both direct and indirect costs. Clear and concise wording is essential when writing exceptions to the release language.

C. Unilateral Contract Modification

If there is no agreement between FHWA and the contractor, the CO should issue a unilateral contract modification. Exhaust all avenues of reaching agreement on a bilateral modification (or bilateral with exceptions) before issuing a unilateral contract modification.

Unilateral modifications are also used to issue change orders (see Section 3-3).

3-6.15 Prepare the Contract Modification Package

A. Contract Modification

1. SF-30 (see Subsection 3-7.1)
2. SF-30a (see Subsection 3-7.2)
3. Plans, details, specifications, drawings or other data required to clearly state the nature and scope work required by the modification
4. WFLHD 10 (see Subsection 3-7.3)

B. Support Documentation

1. Procurement Request
2. IGE
3. Contractor’s price proposal
4. Pre-negotiation Memorandum
5. Price Negotiation Memorandum
6. Documentation of cross-functional team involvement and concurrence
7. Correspondence - Include copies of pertinent correspondence. **DO NOT** include original correspondence with the modification.
 - a. Contractor
 - b. FHWA (memos, e-mails, client and contractor correspondence)
 - c. Miscellaneous (client, resource agency, etc.)
8. Records of any relevant discussions or field reviews
9. Certification for cost or pricing data (if required)
10. Concurrence from client agencies if needed, including commitments of any funding they may provide

3-6.16 Send the Contract Modification to the Contractor for Signature

It is highly recommended that you fax a copy of the modification to your COE for their review before you send the contract modification to the contractor.

For bilateral modifications, send three copies of the contract modification (SF-30, SF-30a, WFLHD 10, plans, specifications, drawings, and other data which identifies the scope of work) to the contractor. One copy is for their use and the other two copies should be signed and returned to FHWA for the CO's approval. Do not send any support documentation (Subsection 3-6.15 B1 - B10) to the contractor.

For unilateral modifications, make one copy of the entire package (Subsections 3-6.15A & B) for yourself and proceed to Subsection 3-6.18. Do not send anything to the contractor.

3-6.17 Copy Contract Modification Package for the Project Office

Once the contractor has signed and returned the contract modification (bilateral CM's only), make one copy of the entire package (Subsections 3-6.15A & B) for the project office.

3-6.18 Complete the Contract Modification Database Report

The *Contract Modification Database Report* is used to measure the amount of and reasons for contract growth. Complete the report and include it with the contract modification package.

3-6.19 Forward the Contract Modification (with all support documentation) to the COE

Forward the entire package (2 originals of Subsection 3-6.15A and 1 set of Subsection 3-6.15B) to the COE. It is imperative that you provide the entire package to the COE immediately after the contractor has signed the modification (for bilateral modifications). Until the appropriate CO signs the modification, it is not an executed agreement, and the contractor has the right to withdraw their offer. Work provided in the modification cannot legally begin until the CO has signed the modification.

3-6.20 Review and Approve Contract Modification

The COE is responsible for ensuring that the modification is approved by the appropriate level CO within a timely manner.

Once the modification has been signed by the appropriate CO, the COE forwards the modification to the Final Review Engineer for copying and distribution to the Project Engineer and others. One original modification, with all support documentation is sent to the central files, and the other original (modification only) is sent to the contractor. The Final Review Engineer also enters the contract modification data into the Construction Status Database.

3-7 Instructions For Completing SF-30 and Continuation Sheets

3-7.1 SF 30, Amendment of Solicitation/Modification of Contract

| BLK | TITLE | INSTRUCTIONS |
|-----|--|---|
| 1 | Contract ID Code | Leave blank. |
| | Page of Pages | Include only pages to be sent to the contractor. |
| 2 | Amendment/Modification Number | Enter four digit consecutive number assigned to each bilateral or unilateral contract modification (e.g., "CM No. 0004"). |
| 3 | Effective Date | Enter "See block 16C." |
| 4 | Requisition/Purchase Req. No. | Leave blank. |
| 5 | Project No. | Enter the Project Number, such as MT PFH 66-1(2). |
| 6 | Issued by | Enter "Western Federal Lands Highway Division" and the Vancouver address. |
| 7 | Administered by | Leave blank. |
| 8 | Name and address of contractor | Enter contractor name and address as shown on the contract. |
| 9 | Amendment of solicitation no. and date | Leave blank. |
| 10A | Modification of Contract/Order No. | Enter the DOT contract number, such as DTFH70-95-C-00001. This is on the award letter and the executed contract. |
| 10B | Dated | Enter the contract award date. |
| 11 | | Not applicable. Leave blank. |
| 12 | Accounting and appropriation data | Use the appropriate account such as, 19A-17-41-54-0161-0002. Do not enter your CE account number! |
| 13A | | Mark this block for a unilateral modification under the Changes clause (FAR Clause 52.243-4). |
| 13B | | Mark this block for administrative changes. |
| 13C | | Mark this block for bilateral modifications. Cite the appropriate contract clauses by number and name (e.g., FAR Clause 52.236-2, Differing Site Conditions; FAR Clause 52.243-4, Changes; FAR Clause 52.242-14, Suspension of Work, etc.) |
| 13D | | Mark this block for unilateral modifications performed under any clause <u>other than</u> the Changes clause (e.g., FAR Clause 52.236-2, Differing Site Conditions; FAR Clause 52.242-14, Suspension of Work, etc.). Cite the appropriate clause by number and name. |
| 13e | | For bilateral modifications, mark the <i>is required to sign this document and return <u>2</u> copies to the issuing office</i> block. For unilateral modifications, mark the <i>is not required to sign this document</i> . Send unilateral modifications via certified mail. |

| BLK | TITLE | INSTRUCTIONS |
|-----|---------------------------------------|---|
| 14 | Description of amendment/modification | <p>Give a concise description of the modification and the effect on contract time. DO NOT state the reason for the modification in this block or anywhere else on the modification. The 'reason' should only be stated in the support documentation.</p> <p>Include the following release language: <i>In consideration of the equitable adjustments paid pursuant to this contract modification, the Contractor hereby releases the Government from any and all liability under this contract due to any facts or circumstances arising out of this contract modification.</i></p> |
| 15A | Name and title of signer | This block is usually filled in by the contractor. |
| 15B | Contractor/Offeror | The person named in Block 15A, the <u>authorized representative</u> of the contractor, signs in this block to indicate agreement to a bilateral contract modification. |
| 15C | Date signed | The person signing in Block 15B enters the date signed. |
| 16A | Name and title of contracting officer | This block will be completed by the appropriate CO. The CO will include their CO warrant #. |
| 16B | United States of America by | The person named in Block 16A will sign here. |
| 16C | Date signed | The signing CO will enter the date. |

3-7.2 SF30a, Continuation Sheet

SF30a is used to continue the description of the modification (Block 14) and to present any changes to the plans or specifications.

When adding or modifying specifications, use the format presented in the FP. Place the specification revision under the appropriate section number and name, heading (e.g., Description, Material, Construction Requirements, Measurement, or Payment) and subsection title (i.e., 601.03 Concrete Composition, 601-5 Placing Concrete, etc.). For instance, if you are modifying the first paragraph of 601.04, your specification would appear as follows:

| |
|---|
| <p align="center">Section 601. – MINOR CONCRETE STRUCTURES</p> <p align="center">Construction Requirements</p> <p>601.04 General. <u>Delete the first paragraph and substitute the following:</u></p> <p>Perform excavation and backfill work under Section 208. When concrete is cracked, spalling, or scaling, remove concrete to the nearest joint.</p> |
|---|

Use the following instructions when modifying the specifications:

Add the following:

Amend as follows:

Add the following before the first paragraph:

(Added Subsection.)

Delete the first paragraph and substitute the following:

3-7.3 WFLHD 10, Continuation Sheet

WFLHD 10 is used to summarize the contract items and dollar amount changes included in the modification. Complete the following on WFLHD 10:

| Block | Instructions |
|---|--|
| Reference No. of Document Being Continued | Type the contract modification number (e.g. CM No. 0004) here. |
| Page of Pages | Include only the pages in the CM itself (i.e. the part you are sending to the contractor.) |
| Name of Offeror or Contractor | Contractor's Name |
| Item Number | e.g. 20401, 60201 Use the FP or the Master Pay Item Listing to determine the appropriate item number. If you are increasing or decreasing the quantity of an item which is already in the contract, with no change to the price, place the item number in the "existing" column. If the item doesn't already existing in your contract (bid schedule or prior CM's), put the item number in the "new" column. |
| Item Name | e.g., Roadway excavation Use the FP or the Master Pay Item Listing to determine the appropriate item number. |
| Quantity | the quantity added, deleted, or modified |
| Unit | e.g. square meter, metric ton, etc. |
| Unit price or lump sum price | unit price or lump sum price |
| Amount | the product of the quantity and the unit price |
| bottom block | Check "() <i>without modification</i> " if you have not revised any specifications. Otherwise, check "() <i>as modified . . .</i> " |